Special Report

New Jersey's Expanded Mini-WARN Law to Take Effect April 2023

By Isaac J. Burker, Jeffrey J. Corradino, Michael Jakowsky, James M. McDonnell, Justin B. Cutlip, Jennifer Ellerkamp &

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Meet the Authors

Isaac J. Burker
Principal
(914) 872-6870
Isaac.Burker@jacksonlewis.com

Jeffrey J. Corradino
Principal
908-795-5134
Jeffrey.Corradino@jacksonlewis.com

After a two-year delay, the amendment to the New Jersey Millville-Dallas Airmotive Plant Job Loss Notification Act, the state's mini-WARN law, will take effect on April 10, 2023.

The Act, as amended, expands the coverage of the law to workplace reductions-in-force and significantly increases an employer's obligations. Definitions, notice timelines, employers' severance obligations, and payment requirements for failure to provide notice are among the provisions revised. Under the expanded scope of coverage and new financial burdens on employers, employers seeking to restructure or remove business operations within the New Jersey will face increase risks.

Governor Phil Murphy signed the amendment into law on January 21, 2020. The amendment was to take effect in July 2020; however, because of the COVID-19 pandemic, Murphy extended the effective date until 90 days after the termination of the New Jersey State of Emergency (Executive Order 103). Executive Order 103 is still in effect, with no clear indication of when it will be terminated. Therefore, the legislature passed Assembly Bill 4768 (AB 4768) to revise the effective date of the 2020 amendment to 90 days after AB 4768 becomes law. AB 4768 was signed by Murphy on January 10, 2023.

This special report analyzes the revisions to the Act, compares an employer's obligations under the new law with those under the federal Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101, *et seq.,* and discusses practical implications of the changes to the Act to businesses and the potential legal challenges to expect.

Definitions

The new law revises four defined terms: (1) establishment; (2) full-time employee; (3) part-time employee; and (4) mass layoff. These changes expand the Act's coverage to previously exempted employers and employment actions and place differing obligations on employers with multistate operations that include locations within the state.

Establishment

Previously, the Act applied only to a "single place of employment" in which a *mass layoff,* termination of operations, or transfer of operations occurred. The new definition eliminates the "single place of employment" qualification. The new law provides:

> *Establishment* means a place of employment which has been operated by an employer for a period longer than three years but shall not include a temporary construction site. *Establishment* may be a single location or group of locations,

Michael Jakowsky
Principal
212-545-4086
Michael.Jakowsky@jacksonlewis.com

James M. McDonnell
Principal
908-795-5208
James.McDonnell@jacksonlewis.com

Justin B. Cutlip
Of Counsel
908-795-5136
Justin.Cutlip@jacksonlewis.com

Jennifer Ellerkamp
(She/Her • Jenny)
KM Attorney
303-876-2223
Jenny.Ellerkamp@jacksonlewis.com

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> including any facilities located in this State.

The legislature intended the changes to expand what is a covered *establishment* by eliminating the "single place of employment" qualification and including "any facilities located in this State." It is not clear how far the legislature intended to go. Thus, for example, a company with operations at five separate locations, with a loss of at least 10 employees (whether full-time or part-time) at each location, arguably may be subject to the notice-and-severance-pay requirements under the elimination of the "single place of employment" qualification and the inclusion of "any facilities located in this State" to the definition.

If the provision is interpreted broadly, any time at least 50 employees in the aggregate suffer a termination of employment within a 30-day or 90-day period in New Jersey, the notice-and-severance requirements under the new law would be triggered.

Full-Time Employee/Part-Time Employee Distinction is Eliminated

Employers with at least 100 employees, whether full-time or part-time, are covered employers under the new law. Previously, and consistent with its federal counterpart, the Act limited notice obligations to covered employment actions that affected only *full-time employees.* The new law makes no distinction between *full-time* and *part-time employees.*

Eliminating the distinction expands the scope of the Act's coverage. Now, if 50 employees (whether full-time or part-time) are affected by a *mass layoff, termination of operations*, or *transfer of operations*, the employer must meet the notice-and-severance obligations.

Moreover, any employee suffering a termination of employment is counted toward whether a mass layoff, transfer, or termination of operations has occurred, including employees *reporting into New Jersey* (*e.g.,* field employees, remote employees, and so on). This makes it more likely that an employment action is a covered event.

Mass Layoff

The new law expands the definition of *mass layoff* to include reductions in force beyond those that may trigger notice requirements under federal WARN. The revised statutory definition eliminates the previous acts thresholds (500 terminations or 50 employees that represent a third of the workforce) and, instead, triggers a WARN event if an accumulation at least 50 employees are terminated in the state (including impacted employees *reporting into* New Jersey) within a 30-day or 90-day period.

The new language is as follows:

> *Mass layoff* means a reduction in force which is not the result of a transfer or termination of operations and which results in the termination of employment at an establishment during any 30-day period for 50 or more of the employees at ***or reporting to*** the establishment.

(Bold italics denotes the new statutory language.)

Some argue that the new *mass layoff* language should not be interpreted so expansively. The argument poses that if the legislative intent was to aggregate all

terminations at any facility in the state to determine whether a *mass layoff* has occurred, the phrase "or reporting to" would be meaningless. Further, by including "or reporting to" in the definition, the legislature arguably intended to include terminations at other facilities only if the employees at the other location were "reporting to the establishment."

For instance, if an employer had two locations and will terminate 30 employees at each, this arguably would be a *mass layoff* only if the employees at one of the locations were reporting to the other *establishment.* If that is not the interpretation, then each location would constitute a separate *establishment* and there would be no *mass layoff,* because each *establishment* had only 30 employees suffer a termination of employment. Unfortunately, the legislature's intent in including the requirement that the employees be "at *or* reporting to" the *establishment* is unclear.

What is clear is that, effective April 10, 2023, any reduction in force of at least 50 employees at *a single place of employment* will require 90 days' notice and severance. Whether the revisions to these core definitions of the law also mean that a reduction of at least 50 employees at "any facilities located in the State" requires 90 days' notice and severance pay remains unclear. Unfortunately, there is a tremendous risk if employers are incorrect.

Notice and Severance Pay Mandates

Under federal WARN, covered employers must provide 60 days' written notice to affected employees of a mass layoff or a plant closing. Previously, the Act followed WARN in requiring 60 days' written notice; *this has been increased to 90 days' written notice under the new law.*

Under the amendment, an employer also *must pay each affected employee one week of severance for each full year of employment,* even if the employer provides the full 90 days' notice. If an employer fails to provide the full 90 days' notice, it must pay each employee an additional four weeks of severance pay. This has made New Jersey among the very few states to require 90 days' advance notice *and* force employers to pay severance to employees who experience an employment loss by a mass layoff, transfer of operations, or termination of operations.

Guaranteed Severance

The new law requires employers to provide "severance pay equal to one week of pay for each full year of employment" to each employee affected by a *mass layoff, transfer, or termination of operations*. Lacking any qualifiers, the language presumably applies to any employees, including highly compensated executives, affected by a covered employment action.

The rate of severance is the employee's regular rate over the last three years of employment or the final regular rate, whichever is higher. To the extent a collective bargaining agreement, company policy, or employee agreement provides for severance, the new law requires the employer to pay severance under the Act or the employer plan, whichever is greater.

Further, the new law describes *severance pay* as:

> *compensation due to an employee for back pay* and losses associated with the

> termination of the employment relationship and *earned in full upon the termination of the employment relationship,* notwithstanding the calculation of the amount of the payment with reference to the employee's length of service.

The definition increases the financial burden on a company. Pursuant to N.J.S.A. § 34:11-4.2, the severance related to a covered employment action under the Act is regarded as wages earned upon termination. Therefore, severance cannot be paid as a continuation of wages over a period of time; it must be paid in a lump sum on the first regularly scheduled pay day following the employee's final day of employment. The financial costs may be substantial if a large group of employees are terminated on the same day.

Expanded Definition of *Employer*

Although the statute already defines *employer,* a separate provision has been added, likely to include private equity or venture capital firms within the definition. According to a report, ***New Jersey Mandates Severance Pay For Workers Facing Mass Layoffs*** bill sponsor Senator Joseph Cryan stated, "When these corporate takeover artists plunge the companies into bankruptcy, they walk away with windfall profits and pay top executives huge bonuses, but the little guys get screwed."

Employer has been expanded to include:

> any individual, partnership, association, corporation, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, and includes any person who, directly or indirectly, owns and operates the nominal employer, or owns a corporate subsidiary that, directly or indirectly, owns and operates the nominal employer or makes the decision responsible for the employment action that gives rise to a mass layoff subject to notification.

This expanded definition suggests that an individual with no ownership interest, but who was directed to reduce headcount, reorganize operations, or develop and implement cost-saving measures that result in a covered employment action, may be held liable.

Waivers

The new law also curtails an employer's ability to obtain a waiver of severance. New Jersey prohibits waiver of any severance payments absent approval by the commissioner of the Department of Labor or a court of competent jurisdiction.

Finally, given the mandated severance, an employer's prior practice of conditioning severance upon signing a general release agreement may no longer satisfy the "consideration" requirement to support a release of claims. Companies may have to offer *more* than the severance guaranteed in the Act to obtain an effective release of claims. This may still not be enough. The new law requires an employer to provide an employee the severance payment under the law, a collective bargaining agreement, or an employer policy for any other reason, *whichever is greater.* Arguably, an employer that provides greater severance under its own plan may be required by the statute to provide such severance and the severance cannot constitute consideration for a release agreement. Such an interpretation likely would result in employers eliminating any severance policy that provided severance beyond New Jersey law.

What's Next for Employers

Employers with operations in New Jersey must undertake a broader analysis of the legal implications associated with any covered employment decision that results in the termination of at least 50 employees. This may include the following:

- A company must determine whether the notice and severance obligations apply to any contemplated action to ensure the company maintains sufficient funding to meet any obligations imposed by the statute, among other considerations.
- Employers may wish to consider phased reductions in force, over longer periods of time, to avoid any single employment action falling within the definition of a *mass layoff* or other covered employment action.
- If an employer seeks a release of claims as part of any severance payment, the company should consider modifying existing severance plans to avoid claims that the employer's plan is greater than the severance requirements of the Act and, thus, not subject to a release agreement. Employers likely will need to provide other consideration to support the release of claims.
- Employers should review its current New Jersey operations, as well as whether out-of-state employees are "reporting to" the New Jersey location. Employers with satellite operations or remote employees that are "reporting to" a New Jersey location may want to consider whether it is possible to change the reporting relationships of these non-New Jersey resident employees.

Employers must revisit severance plans, employment policies, and general procedures for obtaining releases from employees in exchange for severance pay to ensure compliance with the law. Employers should consult with legal counsel before taking any such actions, especially when it involves compliance with the notice requirements under the law.

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A challenge to the new law is pending in the U.S. District Court for the District of New Jersey. Certain laws appear to provide a basis for a challenge, *e.g.,* ERISA, 29 U.S.C. § 1001, *et seq*., the National Labor Relations Act, 29 U.S.C. § 151,*et seq*., and the U.S. Bankruptcy Code. However, the U.S. Supreme Court has held that neither ERISA nor the NLRA preempts a similar mandatory severance pay statute in Maine. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987). In that case, the Supreme Court held that ERISA did not preempt the Maine statute because the statute concerned employee benefits (not regulated by ERISA), rather than employee benefit *plans* (governed by ERISA). The Court also held that the establishment of mandatory severance in the event of a mass layoff or closing constituted a valid exercise of the state's police powers. Indeed, the Court described the Maine statute as an "unexceptional exercise of the state's police power" in the establishment of a minimum labor standard.

Jackson Lewis attorneys are monitoring the pending litigation. Please contact a Jackson Lewis attorney with any questions.

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